Supreme Court, U.S.
FILED

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No _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

WILLIAM EDWARD TAYLOR

Petitioner,

-vs-

STATE OF MISSOURI

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE WESTERN DISTRICT OF THE
MISSOURI COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI TO THE WESTERN DISTRICT OF THE MISSOURI COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE MISSOURI COURT OF APPEALS PROPERLY CONSIDERED "INEVITABLE DISCOVERY," WHERE THE ISSUE WAS NEVER RAISED BY THE STATE OF MISSOURI, IN DETERMINING THERE WAS NO PREJUDICE TO PETITIONER CAUSED BY SEIZURES PURSUANT TO A SEARCH WARRANT ISSUED BY A DISQUALIFIED JUDGE, OR WHETHER THIS *SUA SPONTE* CONSIDERATION IMPROPERLY PLACED UPON THE PETITIONER THE BURDEN OF ANTICIPATING AND REFUTING A POSSIBLE "INEVITABLE DISCOVERY" ARGUMENT?

2. WHETHER THE PURPOSE OF THE EXCLUSIONARY RULE, AS RECOGNIZED IN *U.S. V. LEON*, 486 U.S. 154 (1984) WOULD BE SERVED BY ALLOWING A WARRANT TO LAWFULLY ISSUE TO SEIZE EVIDENCE ALREADY SUPPRESSED FOR USE IN THE SAME PROCEEDING IN WHICH THE EVIDENCE WAS SUPPRESSED, AND CONSEQUENTLY, WHETHER A DETERMINATION ON THE BASIS OF "INEVITABLE DISCOVERY UNDER A LAWFUL WARRANT," THAT THERE IS NO PREJUDICE RESULTING FROM THE SECOND SEIZURE SERVES OR DEFEATS THE PURPOSE OF THE EXCLUSIONARY RULE?

3. WHETHER THE PETITIONER, IN A TRIAL FOR FIRST DEGREE MURDER, (DEATH PENALTY WAIVED) WHEREIN THE JURY WAS INSTRUCTED, IN ACCORDANCE WITH STATE LAW, THAT THE ONLY SENTENCE WHICH COULD BE

IMPOSED FOR FIRST DEGREE MURDER WAS LIFE WITHOUT THE POSSIBILITY OF PROBATION OR PAROLE, WAS DENIED DUE PROCESS OF LAW WHEN THE COURT ESSENTIALLY GAVE NO ANSWER TO THE JURY'S INQUIRY AS TO THE "LENGTH" AND MINIMUM TIME TO SERVE FOR PAROLE ELIGIBILITY SHOULD THE DEFENDANT BE SENTENCED TO LIFE IMPRISONMENT FOR MURDER IN THE SECOND DEGREE?

PARTIES:

There are no parties to this cause not mentioned in the caption.

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Petitioner,

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PETITION FOR WRIT OF CERTIORARI TO THE
WESTERN DISTRICT OF THE
MISSOURI COURT OF APPEALS

Petitioner, William Edward Taylor, respectfully prays that this court issue a writ of Certiorari to review the judgment of the Western District of the Missouri Court of Appeals, discretionary review of which judgment was denied by the Supreme Court of Missouri, on May 27, 1997.

CITATIONS TO OPINIONS

The Opinion of the Western District of the Missouri Court of Appeals in this matter was handed down on February 18, 1997, in case number WD 51906. It is published as *State v. Taylor, 945 S.W.2d 675 no.3,* (Mo. App. 1997). The Order of the Missouri Supreme Court, in case number 79872, denying

Petitioner's Application for Transfer, entered on May 27, 1997, is not published.

BASIS FOR JURISDICTION

Petitioner seeks review in this court, of a judgment entered by the Western District of the Missouri Court of Appeals, the highest court of the state in which he is entitled to review as of right on the issues raised. The opinion was handed down on February 18, 1997, and a copy of the slip opinion appears at Appendix, P.12.

Petitioner timely moved for rehearing or transfer to the Supreme Court of Missouri, Pursuant to Rules 30.26, and 83.02, Missouri Supreme Court Rules, on March 5, 1997. The Motion and the Suggestions in Support of the Motion appear at Appendix, PP. 21, 26. The Motion was denied on April 1, 1997. A copy of the Notice of the denial of said application appears at Appendix, P. 33.

Petitioner's application for Transfer, filed in the Supreme Court of Missouri, in accordance with Rule 83.03, Missouri Supreme Court Rules, was timely filed on April 16, 1997. The Application and the Suggestions in Support of the Application appear at Appendix PP.34, 43. On May 27, 1997, the Missouri Supreme Court entered its Order denying transfer. A copy of the Notice appears at Appendix P. 50. Under rule 83.02, Missouri Supreme Court Rules, motions for reconsideration of such orders "shall not be accepted or filed."

Because the rights Petitioner claims were denied him are guaranteed by the Constitution of the United States, specifically, the fourth, fifth, and fourteenth amendments thereto, Petitioner claims that this court has jurisdiction to review the judgment by Certiorari under Title 28, U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS, ETC. INVOLVED IN THE CASE

(Relevant constitutional, statutory and rule provisions, and Approved Criminal Instruction language appear in the Appendix to this Petition)

Fourth Amendment, Constitution of the United States

Fifth Amendment, Constitution of the United States

Fourteenth Amendment, Constitution of the United States

28 United States Code, §1257 (Certiorari Jurisdiction)

§565.020, Revised Statutes of Missouri (First Degree Murder Defined and punishment fixed)

§565.021, Revised Statutes of Missouri (Second degree Murder Defined and punishable as Class "A" felony)

§558.011.1(1), Revised Statutes of Missouri, (Punishment for class "A" felony)

§565.030.2, Revised Statutes of Missouri (Trial procedure, First Degree Murder.)

Missouri Approved Instructions-Criminal, Notes on use 313.00 note 5(A) (2) (Submission of last paragraph of MAI-CR 313.02, punishment, in first stage of trial.)

Missouri Approved Instructions-Criminal 313.02, and Note 3, Notes on use. (Submission of imprisonment for life with out parole in death penalty waived cases)

Rule 30.26, Missouri Supreme Court Rules (Motion for rehearing)

Rule 83.02, Missouri Supreme Court Rules (Motion in Court

of Appeals for Transfer to Missouri Supreme Court)

Rule 83.03, Missouri Supreme Court Rules (Application to Missouri Supreme Court for Transfer from Court of Appeals)

STATEMENT OF THE CASE

Petitioner was convicted in the circuit court of Nodaway County, Missouri, of murder in the first degree, in violation of Revised Statutes of Missouri, §565.020, and sentenced to life in prison without possibility of probation or parole, Appendix, P. 8, after the prosecution waived the death penalty.

The victim was Petitioner's wife of fifteen years. There was evidence that the marriage had to that point been free of strife, and in support of Petitioner's defense of not guilty by reason of mental disease or defect excluding responsibility, that he had in recent months become a victim of delusional disorder, jealous type, to the extent that he was unable to appreciate the wrongfulness of his actions.

The victim was run over by a combine, apparently activated by a piece of string tied to its "hydrostat lever," enabling Petitioner to pull the lever from a position standing on the ground beside the combine. There was controversy over whether Petitioner's wife crawled under the combine to retrieve the body of a cat, killed and thrown under the combine by Petitioner, or whether the wife was thrown under the combine during or after a struggle with Petitioner. The latter scenario conflicted with the version of the killing told by Petitioner to the defense psychiatrist, and was vigorously argued by the state against the "mental disease or defect" defense.

A substantial portion of the evidence in support of the "struggle theory " advanced by the state came from photographs,

a videotape, and measurements, of the combine itself, which, according to the state, supported a conclusion that certain facial injuries to Petitioner's wife could not have been caused by contact with the ground or the combine while it ran over her in the manner testified to by the defendant. Evidence of this sort was the subject of two defense motions to suppress.

Petitioner's first "Motion to Suppress Physical Evidence" sought the suppression of, inter alia, photographs, diagrams, and reenactments done using the combine, during two searches of Petitioner's premises within the first two days after the killing. (Appendix, P. 57 paragraph 1 (f). After an evidentiary hearing, the court, by letter[1], instructed the Circuit Clerk to prepare a docket entry suppressing "any matters seized by the state during the warrantless searches of November 11 and 12, 1995 (sic for 1994) None of the photos or diagrams may be used; no simulation or testing conducted during these searches may be referred to during the trial." (Appendix, P.61)

Subsequent to the suppression of the above-mentioned evidence, the state obtained a search warrant to seize the combine, (Appendix P.52), in an *ex parte* proceeding before Nodaway County Associate Circuit Judge Glenn Deitrich, who had previously disqualified himself, *sua sponte,* from the preliminary hearing (Appendix P. 51).

Petitioner filed his second Motion to Suppress, raising various grounds, including that Judge Deitrich having disqualified himself from the cause, any order he issued touching on the same subject matter was void, including the search war-

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[1]Because a motion for change of judge had been granted, Associate Circuit Judge Daniel Czamanske of Platte County, Missouri, was designated to hear the case. He instructed the Clerk by mail as to certain docket entries. This entry was not physically made, but from the way the trial was conducted, it is clear counsel and the court had no doubt as to its efficacy.

rant, and that, because the purpose of the warrant was to recreate evidence suppressed because of the first, illegal search, the information used to obtain the evidence was the "fruit of the poisonous tree." (Appendix 63)

The second Motion to Suppress was overruled. The issue was preserved by objection at trial, and by Motion for Judgment of Acquittal or in the Alternative for New Trial. (Appendix P. 67)

The court submitted verdict directing instructions for First Degree and Second Degree Murder. The Instruction submitting First Degree Murder instructed the jury that, if they found Defendant guilty, they must sentence him to "life imprisonment, without eligibility for probation or parole." (Appendix, P. 84). concerning Murder in the Second degree, the jury was instructed that the permissible sentences were:

1. life imprisonment
2. Imprisonment at a term fixed by you but not less than ten years and not to exceed thirty years.

After three hours of deliberations, the jury inquired of the court as follows:

> "In second degree life imprisonment, how long is a life sentence? of that life sentence, what is the minimum number of years before being eligible for parole?"

To which the Court made the written response,

> "Please be guided by the instructions."

(Appendix, P. 86)

In his Motion for New Trial, Petitioner claimed error in failing to instruct the jury that when sentenced to life imprisonment for Second degree murder, a defendant could not be

released on parole until a minimum of twenty-five years had passed, and that there is no requirement in Missouri law that a person sentenced to life imprisonment ever be released. (Appendix 67 Paragraph 10)

The Missouri Court of Appeals, Western District, did not inquire into the lawfulness of the warrant, because it found that "the information obtained from the combine would have been discovered inevitably by a legitimate search warrant." Appendix P.15.) In his Motion for Rehearing and Transfer filed before the Court of Appeals, and in his Application for Transfer filed in the Missouri Supreme Court, (Appendix P. 21 and 34) Petitioner asserted that by finding "inevitable discovery" without this question ever being raised by the state, the court shifted to him the burden of anticipating and negating this issue, and also questioned whether a lawful warrant can ever issue for evidence suppressed in the same cause.

The Petitioner's timely application for transfer, filed in the Supreme Court of Missouri, which exhausted his remedies in the state courts, was denied on May 27, 1997. (Appendix, P. .50)

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT THE WRIT IN ORDER TO DETERMINE THE PROPRIETY, UNDER *NIX V. WILLIAMS* 467 U.S. 431, AND *BREWER V. WILLIAMS*, 430 U. S. 387, (1977) OF THE RAISING OF THE "INEVITABLE DISCOVERY" EXCEPTION TO THE EXCLUSIONARY RULE *SUA SPONTE* BY AN APPELLATE COURT, AND WHETHER SUCH CONSIDERATION UNFAIRLY RELIEVES THE STATE OF THE BURDEN OF DEMONSTRATING BY A PREPONDERANCE OF THE EVIDENCE THAT EVIDENCE WOULD INEVITABLY HAVE BEEN LAWFULLY DISCOVERED EVEN HAD THE UNLAWFUL QUESTIONING, SEARCH, ETC. INVOLVED NOT TAKEN PLACE.

The Western District of the Missouri Court of Appeals held that regardless of the illegality of the search challenged by defendant, the evidence obtained would have been "inevitably discovered" by obtaining a lawful search warrant. (Appendix, P. 15) Before the Circuit court of Nodaway County, Petitioner objected to the introduction of photographs, measurements, and a videotaped demonstration, involving a combine seized pursuant to a search warrant obtained from a judge who had previously disqualified himself from the case. (Appendix P.51) Petitioner had claimed that disqualification deprived the judge of jurisdiction, under Missouri law, to do any act with relation to the subject matter of the alleged murder of Debra Williams by Petitioner, and that without a lawfully issued warrant, the search was in violation of the Fourth Amendment to the Constitution of the United States

In *Brewer v. Williams,* 430 U.S. 387, (1977) this court

found that certain evidence (the body of the murder victim) had been obtained by the :"functional equivalent of questioning," in violation of the defendant's right to counsel, but because absence of prejudice under the "inevitable discovery" doctrine had been raised, the court did not rule outright that the evidence should have been suppressed. Rather, the court remanded the cause in order to give the prosecution the opportunity to demonstrate by a preponderance of the evidence, that the body would have inevitably been discovered, even without the illegally obtained statement. Eventually, in *Nix V. Williams,* 467 U.S. 431, (1984) the court considered the evidence submitted in support of "inevitable discovery," including a massive search for the victim or her body, and found it sufficient to support a determination by the preponderance of the evidence that the body would inevitably have been found.

In both *Williams* cases, this court placed the burden of demonstrating "inevitable" discovery on the prosecution. It is submitted that the Western District of the Missouri Court of Appeals placed no burden whatsoever on the prosecution in this case, but, in fact, placed on the Petitioner the burden of anticipating and refuting "inevitable discovery," despite the fact that this theory was never raised by the state.

The Missouri Court of Appeals presented another reason to find "no prejudice" in the failure to suppress the evidence obtained in the search. The Petitioner suggests that it should not preclude this court from considering the "inevitable discovery" question, because it is patently illogical.

As noted, in the Statement of the case, Petitioner's mental disease or defect defense was seriously undermined by the prosecution's theory that his wife was thrown or pushed under the combine after a struggle. The Western District of the Missouri Court of Appeals noted that the state presented expert

witnesses who testified to their conclusions that Petitioner did not suffer from a mental disease or defect excluding responsibility (Appendix, P.12) , and used the presence of these witnesses as a further grounds for its determination that defendant was not prejudiced by the evidence supporting the "struggle theory." It is suggested that there is no logic to such a determination. The psychiatric or psychological witnesses presented by the state testified to conclusions different from those expressed by Petitioner's expert, based on essentially the same facts he relied upon, and upon their own examinations of the Petitioner. They did not give any testimony to refute the facts on which Petitioner's expert based his opinion,.

It was the search and seizure which made possible testimony supporting the "struggle theory." That is the prejudice suffered; and it is not cumulative to the state's expert testimony on mental disease or defect. This court should consider the propriety of a *sua sponte* appellate determination that evidence would have "inevitably" been discovered

II. THIS COURT SHOULD GRANT THE WRIT IN ORDER TO EXAMINE WHETHER OR NOT EVIDENCE, ONCE EXCLUDED BECAUSE UNLAWFULLY OBTAINED, SHOULD BE ALLOWED TO BE INTRODUCED IN THE SAME PROCEEDING, OR WHETHER IT WOULD MORE APPROPRIATELY SUIT THE PURPOSE OF THE EXCLUSIONARY RULE IF EVIDENCE UNLAWFULLY SEIZED, AND EXCLUDED FOR THAT REASON, COULD NEVER BE INTRODUCED IN THE SAME PROCEEDING.

In Petitioner's Brief on Appeal, he pointed out the questionable propriety under the Fourth Amendment, of using in a proceeding, evidence once suppressed in the same proceeding

as illegally obtained. (Appendix, P. 82), noting that such practices as obtaining a subpoena for records, where an undercover agent's testimony about those records had been suppressed, (*United States v. Lipschitz*, 148 Fed. Supp. 774, (E.D.N.Y, ;1957)), or attempting to validate an unlawful search by getting an ostensibly lawful warrant after the fact, *State v. Hicks*, 707 P. 2d. 531, (Az App., 1958),. *Thomas v. State*, 220 P. 977 (Ok. Crim App. 1932). See also *People v. Scaramuzzo*, 185 N.E. 578, (Ill. 1983); *Commonwealth v. Black*, 576 A. 2d., 423; *People v. Rocha*, 312 N.W.2d 657 (Mich., 1981); *State v. DeLane*, 503 A.2d. 903 (N.J.); *Stewart. v. State*, 681 S.W.2d 774 (Tex.) had been condemned.

This court's decision in *United States v. Leon* 468 U.S. 897 (1984) determined that decisions concerning the exclusion of evidence should be based on a common-sense approach to the question of whether suppression would further the purpose of the rule, which is to deter unlawful conduct by the authorities. Where the conduct is such that the court determines the evidence should be suppressed, the deterrent impact would clearly be undermined, by allowing the state another opportunity to seize and introduce the evidence. Allowing the authorities a chance to "make up for" an unlawful search by later following the rules substantially undermines the protection against a first unlawful search.

The trial Court here had found that two prior entries onto Petitioner's property had been unlawful searches, and suppressed evidence obtained. (Appendix P. 61) The state was permitted to essentially introduce the very same evidence by, after the suppression, getting a warrant and searching for Petitioner's combine. Because the state essentially lost nothing by its unlawful activity, there could be no lasting deterrence.

III. THIS COURT SHOULD GRANT THE WRIT IN ORDER TO REVIEW WHETHER DUE PROCESS REQUIRES THAT WHERE THE GREATER OFFENSE SUBMITTED CARRIES A SENTENCE OF LIFE IMPRISONMENT WITHOUT PAROLE, AND THE JURY IS SO INSTRUCTED BY THE VERDICT DIRECTING INSTRUCTION ON THAT OFFENSE, THE JURY ALSO BE INSTRUCTED THAT A LIFE SENTENCE FOR THE LESSER OFFENSE SUBMITTED CARRIES A SUBSTANTIAL MINIMUM TERM TO SERVE BEFORE PAROLE.

For offenses committed before August 28, 1994, in Missouri, a person sentenced to life imprisonment, who had no prior felony convictions, was required to serve a minimum of fifteen years imprisonment before becoming eligible for parole. Revised Statutes of Missouri, (repealed) 558.019.3. In the version of that statute which became effective August 18, 1994, it was required that persons sentenced for dangerous felonies, including second degree murder, must serve 85% of their sentence before being paroled. Life imprisonment was to be treated as a thirty-year sentence for such purposes. Thus, if Appellant had been convicted of Second Degree Murder, rather than First Degree Murder, he would have been required to serve a minimum of twenty-five and one half years before becoming eligible for parole.

As required by Revised Statutes of Missouri, §565.030, (Appendix P. 3), in Death Penalty Waived cases, guilt and punishment were submitted to the jury together, and the verdict-directing instruction, (Appendix P. 84) included a paragraph required by Missouri Approved Instructions, 313.00 notes on Use, (Appendix P. 7) and Missouri Approved Instruction 313.02, (Appendix P. 7) which advised the jury that if it found defen-

dant guilty, they must assess punishment at life imprisonment without the possibility of probation or parole. The verdict director for Second Degree murder, (Appendix, P. 85), as in all non-capital offenses, informed the jury that it could impose a life sentence, but made no mention of parole. (App. P.85)

In *Simmons v. South Carolina*, 512 U.S. 154 (1994) the court remarked that it is "impossible to ignore "the reality, known to the `reasonable juror,' that, historically, life term defendants have been eligible for parole." Where one instruction tells the jury it can impose life, without the possibility of parole, and the other mentions only life, it is even harder to ignore the jury's probable conclusion that parole would be possible if Petitioner were convicted of Murder in the Second Degree.

Here, the jury's inquiry made it obvious that the jury was considering a second degree murder conviction instead of first degree murder; that it *was* aware of a possibility of parole , and concerned with the possibility of an early parole. (Appendix P. 86) One might also add to the quote from *Simmons* that the "reasonable juror" will usually underestimate the length of time which will be served prior to parole. The change in Missouri law, effective just months before this offense occurred, makes it even more likely that those who "knew something" about "how long a life sentence really is" would underestimate the probable minimum time served.

In a situation similar to that in *Simmons*, supra, the Missouri Supreme Court recognized the due process implications to a capital defendant where the jury is allowed to consider the possibility of parole from a life sentence. *State v. Cornett,* 381 S.W.2d., 878, (Mo. 1964). After the reversal of the death sentence in *Cornett,* Parole was not mentioned to Missouri Juries, except for the first degree murder instruction which, as noted above, informs the jury that if the defendant is not sentenced to

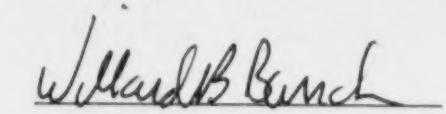
death, he will be sentenced to life imprisonment without the possibility of parole.

Simmons held that a capital defendant can be deprived of due process, under certain circumstances, when a jury is not told that the alternative life sentence would be served without parole. In this death penalty waived case, the jury necessarily knew that the Petitioner would have been eligible for parole if convicted of second degree murder, rather than first degree murder. It is submitted that by permitting the jury to continue deliberations after its inquiry, without informing it of the mandatory minimum term Petitioner would face if convicted of second degree murder and sentenced to life, the court deprived this Petitioner of due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, by chilling the jury's consideration of the lesser offense; Certiorari should be granted to define when a non-capital defendant's due process rights are violated by failure to instruct on minimum prison terms.

CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of certiorari issue to review the judgment of the Western District of the Missouri Court of Appeals.

RESPECTFULLY SUBMITTED



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